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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES J. LEE, Defendant and Appellant.	B182388 (Los Angeles County Super. Ct. No. BA270410)
In re CHARLES JOSEPH LEE, JR., Habeas Corpus.	B184430

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlene F. Olmedo, Judge. Affirmed.

Petition for writ of habeas corpus denied.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Following a court trial, defendant and appellant Charles J. Lee was convicted as charged of possession for sale of cocaine base. In this opinion, we consider both his direct appeal from that conviction and his petition for habeas corpus relief. On appeal, defendant contends: (1) he was denied due process as a result of the terms of his jury waiver; (2) there was insufficient evidence of possession; and (3) there were sentencing errors. In his habeas petition, defendant contends he is entitled to a new trial to present newly discovered evidence that establishes his innocence of the charged offense. We affirm the judgment and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 (*Kraft*)), the evidence adduced at trial established that, at about 1:00 a.m. on June 19, 2004, Los Angeles Police Officer Matthew Jacobik and his partner responded to a domestic violence call at the home of Libotta Perryman. When they arrived at the location, Jacobik noticed that the front window of the single family dwelling was shattered and a chair was lying on the front lawn. Inside, Jacobik could hear screaming and the sound of things being smashed. When no one responded to Jacobik's knock, the officers entered the house.

Once inside, Jacobik saw defendant and Perryman. Perryman "froze" when she saw the officers but defendant, who was wearing a leather jacket, "darted toward the back bedroom." The officers followed defendant. When they reached him, defendant was standing in the threshold of the bedroom door and was no longer wearing the leather jacket. Defendant, who was agitated and argumentative, told the officers that he was helping Perryman, who had been fighting with another man, not defendant. Defendant and Perryman both told the officers that defendant lived there, and defendant identified some clothes in the bedroom as belonging to him.

On a dresser and a table next to the bed, Jacobik noticed a scale and what appeared to be narcotics.[1] Defendant denied that the narcotics belonged to him. A search of defendant's person revealed a pager and $339 in cash, but no narcotics. Perryman had no cash and no pager on her person. Defendant and Perryman were both arrested for possession of narcotics for sale.[2]

Jacobik opined that most of the narcotics found in the house were possessed for sale. His opinion was based on the quantity of narcotics found, the way the narcotics were packaged, the presence of the scale, the absence of smoking paraphernalia, the denominations of currency found on defendant's person and defendant's possession of a pager. Regarding the pager, Jacobik explained that, while most people today carry a cell phone, "a pager is still used as a tool in drug sales, so it is still pertinent."

Perryman testified that she rented the two-bedroom house from her uncle. Defendant kept some clothes at the house, and occasionally stayed over, but he did not have a key. On a prior occasion, Perryman had reported defendant to the police for attacking her at the house. When the police arrived on June 19th, Perryman was under the influence of cocaine and Vicodin – drugs which a man named Clifford brought to the house earlier that day. Some time after she was arrested, Perryman was told that the police found cocaine in the bedroom, but she did not know which bedroom. Perryman did not see Clifford go into the bedroom on the day she and defendant were arrested. Perryman did not recognize a photograph of the baggies of cocaine found in the house that night. She could not recall whether those baggies were in her bedroom when the police arrived. Clifford usually brought lesser quantities, just enough for them to use. Perryman never owned an electronic scale and the one police found in her home did not

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1 The parties stipulated that the officers found six bindles of cocaine weighing a total of 4.13 grams, one bindle of cocaine weighing .76 grams, and an open plastic bag containing .28 grams of cocaine. They also stipulated that defendant tested negative for cocaine on May 10 and June 2, 2004.

2 Perryman pled no contest to the charges.

belong to her. Perryman could not recall Clifford bringing a scale with him. In the four years she had known defendant, Perryman never saw him with narcotics. She did not recall defendant bringing any narcotics with him the night they were arrested.

While Perryman was incarcerated, Marshall Torres, a paralegal with the alternate public defender's office, interviewed her about the events of June 19th. Perryman told Torres that defendant and Perryman lived together on and off, but were separated on June 19th. They argued that night, but Perryman denied defendant ever hit her. Perryman told Torres that defendant had nothing to do with the narcotics found in the house. Perryman did not tell Torres the name of the man she claimed brought the narcotics to the house. Torres could not recall whether he told Perryman that defendant was facing a Third Strike sentence, although there is a reference to this fact in Torres's notes of the meeting.

The trial court convicted defendant as charged and on March 25, 2005, after granting defendant's motion to strike the Three Strikes prior, it sentenced him to the five year high term. Defendant filed a timely notice of appeal.

On May 20, 2005, while the appeal was pending defendant filed in the trial court a petition for writ of habeas corpus on the grounds of newly discovered evidence.[3] The trial court denied the petition, stating that sufficiency of the evidence was a question properly addressed to the appellate court.

On July 18, 2005, defendant in pro per filed a petition for writ of habeas corpus in this court seeking a new trial on the grounds of newly discovered evidence. The claimed new evidence was the testimony of the man Perryman testified brought the drugs into the house; according to defendant, that man had "admitted to leaving the controlled substance behind which has caused [defendant's] incarceration."

In an August 19, 2005, order, we observed that defendant had provided no evidence, such as a declaration from the alleged perpetrator, to support his assertion that

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3 Defendant describes the May 20th filing in his petition to this court, but the record does not include a copy of the May 20th petition.

another person had confessed to the crime of which defendant was convicted; we gave defendant or his counsel on appeal an opportunity to file a supplement to the petition. Defendant filed additional materials on October 25, 2005, including the Declaration of Christopher Price, dated August 29, 2005. Price averred therein: "1. On June 19, 2004, at approximately 1:00 a.m., I was present at the home of Libotta Perryman . . . when police arrived that morning. [¶] 2. Upon the police's arrival, I left the premises. [¶] 3. I am the person who brought the narcotics that were found in Ms. Perryman's home on that date and time. [¶] 4. I am the person who was in possession of the narcotics that were found in Ms. Perryman's home on that date and time, and not [defendant]." In compliance with our subsequent order, the deputy attorney general filed an informal response to the petition and supplement to petition, and defendant filed a reply.

DISCUSSION

A. *The Appeal*

1. *Defendant's Jury Waiver Did Not Violate His Due Process Rights*

Defendant contends his jury waiver violated his right to due process. Relying on *People v. Collins* (2001) 26 Cal.4th 297 (*Collins*), defendant argues that offering a reduced maximum sentence exposure in exchange for a jury waiver is tantamount to punishing the defendant for exercising his constitutional right to a jury trial because implicit in the offer is the threat that the sentence will be more severe if the defendant is convicted after declining to waive a jury trial. We disagree.

A defendant in a criminal proceeding has a right to a jury trial under both the state and federal constitutions. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) However, the practice of accepting a defendant's waiver of the right to jury trial is constitutional. (*Collins, supra*, 26 Cal.4th at p. 305.) For example, plea bargaining is an accepted practice in American courts (*In re Lewallen* (1979) 23 Cal.3d 274, 280-281 (*Lewallen*); see Pen. Code, § 1192.5) and includes a waiver of the right to a jury trial and other constitutional rights. (*Collins, supra*, at p. 305.)

Short of a guilty plea, a defendant may also submit his case for decision by the trial court on the basis of the transcript of the preliminary hearing. Known colloquially as a "slow plea" or a "*Bunnell* submission," this procedure involves the defendant waiving the right to a jury trial and to confront opposing witnesses. (See *People v. Sanchez* (1995) 12 Cal.4th 1, 28.)[4] As consideration for a "slow plea" the prosecution may offer, among other things, a promised sentence, a stipulation that the defendant will be convicted of a lesser degree or lesser offense than that charged in the accusatory pleading, or that one or more counts will be dismissed. (See e.g. *Bunnell, supra*, 13 Cal.3d at p. 606 [defendant charged with first degree murder stipulated to court trial for second degree murder on the basis of preliminary hearing transcripts]; *People v. McCoy* (1992) 9 Cal.App.4th 1578,1584 [promise of concurrent rather than consecutive sentences in exchange for slow plea]; *People v. Huynh* (1991) 229 Cal.App.3d 1067, 1076 [in exchange for eliminating exposure to special circumstance first degree murder, defendant submitted to court trial on second degree murder and manslaughter based on police reports, taped statements and defendant's testimony]).

Plea bargains and "slow pleas" necessarily contain some elements of coercion. (*In re Ibarra* (1983) 34 Cal.3d 277, 287 (*Ibarra*), disapproved on another point in *People v. Mosby* (2004) 33 Cal.4th 353.) "In the normal [plea] bargain, a defendant must choose between pleading guilty and receiving a lesser sentence, or taking his chances at a trial (in which he may be convicted and receive a greater sentence). The prosecutor seeks to avoid the time and expense of trial. These are proper considerations by both parties that do not amount to such coercion as to unduly force a defendant to plead guilty. [Citation.]" (*Ibid*.) However, while "under appropriate circumstances a defendant may

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[4] *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 (*Bunnell*). Unlike a guilty plea, a "slow plea" does not affect the presumption of innocence, the prosecution's burden of proof or the defendant's statutory right to appeal. (*Id.* at pp. 603-604.) In one variation on the "slow plea," the defendant may still put on a defense. But when a "slow plea" is in essence a guilty plea, the defendant must be advised of and waive his *Boykin-Tahl* rights. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.)

receive a more severe sentence following a trial than he would have received had he pleaded guilty . . . ." (*Lewallen*, *supra*, 23 Cal.3d at pp. 280-281), "the state may not punish a defendant for the exercise of a constitutional right, or promise leniency to a defendant for refraining from the exercise of that right. [Citations.] Coercion in either form has been rejected, whether its source is executive, legislative, or judicial in nature. [Citations.]" (*Collins, supra*, 26 Cal.4th at p. 306.) "The impropriety of a trial court's explicit promise of more lenient treatment in sentencing if the defendant waives trial by jury is comparable to the impropriety of harsher treatment imposed because of the defendant's having invoked his or her right to trial by jury." (*Id*. at p. 307.)

What distinguishes a proper waiver of the right to a jury trial in exchange for reduced maximum sentence exposure on the one hand, from improperly punishing a defendant for exercising his right to a jury trial on the other, is the trial court's role in the process; in other words, the prosecutor may negotiate with the defendant but the trial court's role must be more limited. For example, in *Collins, supra*, 26 Cal.4th at page 300, the following colloquy took place before the trial court accepted the defendant's jury trial waiver: "[THE COURT]: Okay. And do you understand that I'm not promising you anything just to get you to waive jury? . . . Do you understand that? [¶] [THE DEFENDANT]: I was told that it would – that it was some reassurance or some type of benefit. [¶] [THE COURT]: Okay. I think that – I think what [defense counsel] may have been referring to is that I indicated to counsel when somebody mentioned that this issue is going to be discussed with you that there might well be a benefit in it. Just by having waived jury, that has some effect on the court. Do you understand that? By not taking up two weeks' time to try the case, but rather giving – just having it in front of a judge alone. . . . Do you understand that? [¶] [THE DEFENDANT]: Yes. [¶] [THE COURT]: Is that your understanding as well? Let me ask you that. [¶] [THE DEFENDANT]: Yes. [¶] [THE COURT]: *I didn't specify and I'm not specifying that there's any particular benefit, but that by waiving jury, you are getting some benefit, but I can't tell you what that is because I don't know yet. Understood?* [¶] [THE DEFENDANT]: Yes. [¶] [COURT]: Okay. Is that agreeable

to you? [¶] [THE DEFENDANT]: Yes. [¶] [THE COURT]: Do you have any questions about waiving jury? [¶] [THE DEFENDANT]: No. [¶] [THE COURT]: Okay. Has anybody made any threats or promises to you to get you to waive jury? [¶] [THE DEFENDANT]: No." (*Id.* at pp. 302-303, some italics in original omitted.)

The court in *Collins* concluded that the "form of the trial court's negotiation with defendant presented a 'substantial danger of unintentional coercion.' " (*Id*. at p. 309, quoting *People v. Orin* (1975) 13 Cal.3d 937, 943.) "[T]he objective of the trial court's comments was to obtain defendant's waiver of a fundamental constitutional right that, by itself (when defendant elects to go to trial), is not subject to *negotiation by the court*. In effect, the trial court offered to reward defendant for refraining from the exercise of a constitutional right. [Citations.] The circumstances that the trial court did not specify the nature of the benefit by making a promise of a particular mitigation in sentence, or other reward, does not negate the coercive effect of the court's assurances. The inducement offered by the trial court to defendant, to persuade him to waive his fundamental right to a jury trial, violated defendant's right to due process." (*Collins*, *supra*, 26 Cal.4th at p. 309, internal footnotes omitted, italics added.) But the court in *Collins* noted that it did not intend to call into question the "well-established practice in which the *prosecutor* and the defendant negotiate a plea of guilty or nolo contendere [citation] . . . ." (*Id*. at p. 309, fn. 4, italics in original.) Accordingly, where the prosecutor and the defendant negotiate a waiver of the right to a jury trial in exchange for a reduced maximum sentence exposure, and the trial court approves the agreement, the defendant has not been denied due process. This is what occurred here.[5]

During discussions of a negotiated disposition before voir dire began, defendant was advised that his maximum sentence exposure was 14 years at 80 percent minimum

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[5] In *Collins*, not only was the judge actively engaged in negotiations, he gave vague assurances of leniency, enhancing the coercive nature of the jury waiver. Here, the trial judge took a less active role in that she merely approved the specific indicated sentence negotiated by the prosecutor and defense counsel, much like a trial judge would do in a plea bargain.

actual time.[6] Defendant rejected the prosecution's offer of four years at 50 percent time in exchange for a guilty plea. Defense counsel informed the trial court that he had discussed with a prior prosecutor "a court trial with a lid" but no such offer had been made by the current prosecutor. Without further discussion of this alternative, defendant admitted one of the alleged strike priors and jury voir dire commenced.

The next afternoon, the following colloquy occurred: "[DEFENSE COUNSEL]: It is my understanding that the People have offered a jury waiver and court trial and that because of that [defendant] would be subjected to no more than six years or low term doubled and certainly the court would have authority and discretion to give [defendant] less than that. [¶] . . . [T]he offer from other district attorneys, have been midterm at half time. [¶] [Defendant] understands his exposure and understands that one of the witnesses, Ms. Perryman, might be very nervous and certainly be more comfortable in a court trial in terms of her testimony and there might be even some stipulations that we can enter into. [¶] I believe he is willing to do that and do that with the understanding it would be this court that would do the court trial." After the prosecutor agreed to this proposal, defendant was advised of and waived his right to a jury trial. Before accepting the waiver, the trial court advised defendant: "As I indicated, I don't want you to feel pressured about any decision that you have made or are making. All right." To which defendant responded: "Okay."

Hence, it was the prosecutor, not the trial judge, who negotiated the jury trial waiver with defendant in this case. Because the trial court's role was limited to assuring that defendant's waiver was knowingly, intelligently and voluntarily given, no due process violation occurred.

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6 The maximum sentence for the charged offense is five years. (Health & Saf. Code, § 11351.5.) Pursuant to the Three Strikes Law, this term could be doubled. (Pen. Code, § 1170.12, subd. (c)(1).) Although four Three Strikes prior convictions were alleged, the prosecutor explained that "per office policy we are proceeding as a second." In addition, four one-year Penal Code section 667.5, subdivision (b) prior prison terms enhancements were alleged.

2. *There Was Substantial Evidence of Possession*

Defendant contends the evidence was insufficient to support the finding that he constructively possessed the narcotics discovered by the police. He argues that there was no evidence defendant had dominion or control over the "contraband found in . . . Mrs. Perryman's home." We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*Kraft, supra*, 23 Cal.4th at pp. 1053-1054.)

" '[A] conviction [for unlawful possession of narcotics] will be sustained if the accused had the immediate right to exercise dominion and control over the known narcotic even though his possession is constructive [citation] or joint with that of another person. [Citations.]' " (*People v. Shoals* (1992) 8 Cal.App.4th 475, 495.) The fact of possession may be established by circumstantial evidence and any reasonable inferences drawn therefrom. For example, dominion and control over contraband may be inferred from evidence that the defendant "had the right to exercise dominion and control over the place where it was found." (*People v. Rice* (1976) 59 Cal.App.3d 998, 1002-1003.) However, "proof of opportunity of access to a place where narcotics are found, without

more, will not support a finding of unlawful possession." (*People v. Redrick* (1961) 55 Cal.2d 282, 285.)

Here, defendant admitted to Jacobik that he lived in the house with Perryman, a fact that Perryman confirmed. When the officers entered the house, rather than waiting to talk to the police, defendant walked directly into the bedroom where the contraband was found. He had removed his jacket which then could have been used to hide the drugs and the scale. Defendant admitted to Jacobik that clothing in that bedroom belonged to him. From this evidence, it can reasonably be inferred that defendant had dominion and control over the bedroom where the narcotics were found and, accordingly, over the narcotics found in that bedroom.

B. *Sentencing*

Defendant contends the trial court erred in sentencing him to the high term because: (1) the reasons the trial court selected the high term were improper; and (2) imposition of the high term violated his right to a jury trial. Both contentions are without merit.

1. *Reasons for Imposing the High Term*

The trial court articulated the following reasons for imposing the high term: "because of the nature and circumstances around this crime with regard to obviously the possession for sale, but also the fact – the circumstances of what brought the police to this particular location indicated danger as well." Defendant contends these reasons were improper because (1) the fact of "possession for sale" is an element of the underlying offense and thus cannot also be used to support imposition of the high term and (2) there was no evidence of violence or dangerous behavior by defendant. We disagree.

California Rules of Court, rule 4.421 lists factors which the trial court may consider in determining whether to impose the high, middle or low term. Rule 4.421(a)(8) identifies as one such factor: "The manner in which the crime was carried out indicates planning, sophistication, or professionalism." Rule 4.421(b)(1) identifies the fact that the "defendant has engaged in violent conduct which indicates a

serious danger to society[,]" as another such factor. "A fact that is an element of the crime shall not be used to impose the upper term." (Cal. Rules of Court, rule 4.20(d).) A single factor in aggravation is sufficient to support a sentencing choice. (*People v. Williams* (1991) 228 Cal.App.3d 146, 153.)

Here, the trial court's comments regarding "the nature and circumstances around this crime with regard to obviously the possession for sale," appear to be a reference to rule 4.421(a)(8). The presence of an electronic scale indicates a level of planning, sophistication and professionalism above and beyond that which is necessary to establish the elements of the offense of possession for sale and not personal use. Accordingly, this fact was properly used by the trial court to select the high term. (Cf. *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1776 [use of firearm to commit robbery supports high term because it exceeds degree of force necessary to establish element of offense].)

Although the planning, sophistication and professionalism factor is sufficient, by itself, to support the high term, the trial court articulated a second factor. The comment that "the circumstances of what brought the police to this particular location indicated danger as well," appears to be a reference to rule 4.421(b)(1). The applicability of this factor is supported by the evidence that, prior to June 19th, Perryman had reported defendant to the police for attacking her. On the day of the arrest, Officer Jacobik was responding to a domestic violence call at the premises and had observed a shattered window and a chair lying on the lawn, and heard screaming and the sound of things being broken inside the house; upon entering the house Jacobik saw only Perryman and defendant, who Jacobik described as "agitated and argumentative." Although Perryman could not recall whether she had been arguing with defendant that night, and defendant denied it, the trial court could reasonably conclude from the evidence that it was defendant who was engaged in the domestic violence that brought the officers to the scene that night. Domestic violence is "violent conduct" within the meaning of rule 4.412(b)(1).

2. *Right to a Jury Trial*

Defendant's reliance on *Blakely v. Washington* (2004) 542 U.S. 296, to support his contention that imposition of the high term violated his right to a jury trial is misplaced. In *People v. Black* (2005) 35 Cal.4th 1238, 1261-1262, our Supreme Court held that *Blakely* is not applicable to California's sentencing scheme.

C. *The Habeas Petition*

Defendant contends he is entitled to a new trial based on the newly discovered evidence of: (1) Christopher Price's identity as the man Perryman testified at trial brought drugs to her house on June 19th; and (2) Price's admission that the drugs were his, not defendant's. Defendant argues that this evidence leads inexorably to the conclusion that defendant is innocent of the charges. We disagree.

A petition for a writ of habeas corpus is a collateral attack upon a final judgment. As such, the petitioner "bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. 'For purposes of collateral attack, all presumptions favor the truth, accuracy and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. . . .' [Citation.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (italics in original).) The petitioner must prove, by a preponderance of the evidence, facts that establish a basis for relief. (*In re Visciotti* (1996) 14 Cal.4th 325, 351.) " '[N]ewly discovered evidence is a basis for [habeas] relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. . . . "[A] criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." ' [Citation.] '[E]vidence which is uncertain, questionable or directly in conflict with other testimony does not afford a ground for relief upon habeas corpus.' [Citation.] '[N]ewly discovered evidence does not justify relief unless it is of such

character as will completely undermine the entire structure of the case upon which the prosecution was based.' [Citation.]" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1322, see also *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246, supersede by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

Here, even assuming the truth of Price's confession that he brought the drugs into the house that day, the evidence does not cast fundamental doubt on the accuracy and reliability of the proceedings. This is because nothing in the new evidence requires the trier of fact to believe that Price had *exclusive* possession of the narcotics. Notwithstanding Price's averment that he and not defendant was in possession of the narcotics, from the evidence that Price left the house without the drugs, the drugs and sales paraphernalia were in a bedroom occupied by defendant, and defendant's possession of a pager and $339 in cash, a trier of fact could reasonably infer that defendant and Price were working together to package the narcotics for sale and thus had joint possession of the narcotics.

DISPOSITION

The judgment is affirmed. The petition for habeas corpus is denied.

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RUBIN, ACTING P. J.

We concur:

BOLAND, J.

FLIER, J.